

GARAN
LUCOW
MILLER P.C.



COMM FAX

On Commercial Law

A Publication Devoted to Commercial Law and Intellectual Property Issues • www.garanlucow.com

ROBERT D. GOLDSTEIN 8332 Office Park Drive Grand Blanc, MI 48439 800.875.3700
TIMOTHY J. JORDAN 1000 Woodbridge Street Detroit, MI 48207 800.875.1530
RACHEL BISSETT, 1111 Long Lake Road, Ste. 300, Troy, MI 48098-6333 800.875-7600

In this issue of Commfax, a recent U.S. Supreme Court decision regarding liability under the Fair Credit Reporting Act is examined.

MODIFICATION OF THE DEFINITION OF "WILLFUL" FOR VIOLATION OF THE FEDERAL FAIR CREDIT REPORTING ACT

By: Rachel Bissett

Consumer suits against information providers for violations of the Fair Credit Reporting Act (FCRA or "the Act") are on the rise. In fact, Channel 7 News in Detroit recently did an investigative report titled "Mortgage Problem" which discussed a consumer's frustration with her mortgage lender for inaccurately reporting her mortgage debt as "delinquent" when she had never been late on a payment. The lender admitted that its reporting was "in error," but, instead of resolving the issue, it stopped reporting the mortgage debt altogether. As a result, the consumer was unable to refinance her loan to obtain a lower interest rate. This type of inaccurate reporting, whether made knowingly or not, is actionable under the Act and could cause a furnisher to be held liable for a willful violation, triggering punitive damages.

The United States Supreme Court recently addressed the question of the standard to prove a willful violation of the Fair Credit Reporting Act (FCRA or "the Act"). In *Safeco Insurance Co. of*

America v. Burr, 127 S. Ct. 2201 (2007), the Court held that willful violations under the Act include both actions made with the knowledge that they violate the Act, and actions made in reckless disregard for the actor's duties under the Act.

There are two standards under which a plaintiff can recover damages under the FCRA. The first is for *negligent* noncompliance. Pursuant to 15 U.S.C.A. § 1681o, any person who "negligently" fails to comply with the Act is liable for the actual damages suffered by the plaintiff and for the plaintiff's attorney's fees. The second standard is for *willful* noncompliance. Pursuant to 15 U.S.C.A. § 1681n any person who "willfully" fails to comply with the Act is liable to the plaintiff for actual damages, statutory damages, punitive damages, and attorney's fees.

Prior to the Supreme Court's decision in *Burr*, many courts narrowly defined "willful" under 15 U.S.C.A. § 1681n to require that the actor have *knowledge* that its actions would violate the Act. See *Rodgers v. McCullough*, 296 F.Supp.2d 895 (W.D. Tenn. 2003), *Ruffin-Thompkins v. Experian Information Solutions, Inc.*, 422 F.3d 603 (7th Circ. 2005), and *Gohman v. Equifax Information Services, LLC*, 395 F. Supp. 2d 822 (D. Minn. 2005). Under such a high standard, most defendants were not held liable for a willful violation, and therefore were not liable for statutory or punitive damages. The *Burr* Court modified the definition.

GARAN LUCOW MILLER, P.C.

ANN ARBOR • DETROIT • GRAND BLANC • GRAND RAPIDS • LANSING • MARQUETTE • PORT HURON • TRAVERSE CITY • TROY

In *Burr*, two separate insurance companies obtained consumers' credit reports in order to determine what initial insurance rates to offer each consumer. The Court was called on to determine whether the Act required that the insurance companies notify consumers when the initial rate offered them increased *because of* a negative credit report. The Court held that it did, and that one of the defendant insurance companies had failed to do so. The Court then turned to whether that defendant had *willfully* violated the Act.

The plaintiffs argued that a willful violation of the Act should be found if the defendants acted in reckless disregard for their duties under the Act. The defendants countered that a willful violation could be found only if they acted with knowledge that their actions were in violation of the Act. As stated above, the Court agreed with the plaintiffs, thus broadening the definition of "willful."

Although the *Burr* decision did choose the broader definition of a willful violations under the Act, the Supreme Court tempered this by establishing a narrow definition of the "reckless disregard" needed to show a willful violation. The Court began by first determining how recklessness is usually defined in civil matters:

While the term recklessness is not self-defining, the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing an *unjustifiably high risk* of harm that is either known or so obvious that it should be known."

(emphasis added). *Safeco Insurance Co. of America* at 2215. The Court paid special attention to the phrase "unjustifiably high risk" in defining recklessness and went so far as to state that "it is this high risk of harm, objectively assessed, that is the essence of recklessness at common law." *Id.*

The Court defined reckless disregard in reference to the Act as follows:

Thus, a company subject to the FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.

Id. at 2215. Therefore, in order for a defendant to be found liable for a willful violation under the "reckless" standard, two prongs must be fulfilled: 1) the defendant's acts must be a violation under a reasonable reading of the Act; and 2) the defendant's reading of the Act must have posed a risk of violating the Act that was substantially greater than that of a merely careless reading. In applying this standard, the *Burr* Court held that the defendant's reading of the statute was not "objectively unreasonable, and so f[e]ll well short of raising the 'unjustifiably high risk' of violating the statute necessary for reckless liability." *Id.*

Although the *Burr* decision redefines the meaning of willful noncompliance under the Act by broadening the definition of "willful," it should not result in a plethora of willful violator findings. The narrow definition of "reckless" will ensure that willful violations are still difficult to prove. In fact, it could be argued that, in order to find recklessness under the Act after *Burr*, a court will have to determine that the defendant either knew his actions were in violation of the act or should have known that they were. If this standard sounds familiar, it should; it is almost exactly the same standard used by courts prior to *Burr*. The only difference is that the definition now would include actions defendants "should have known" would violate the Act.

Ms. Bissett is an associate in the Troy, Michigan office of GARAN LUCOW MILLER, P.C. in the Real Estate Practice Group. She can be reached at (248) 641-7600.

(If you wish to receive your future CommFax via e-mail, please forward your e-mail address to: cvizanko@garanlucow.com. You will then be taken off the mailing list and added to our e-mail list to receive all future CommFaxes.)